



IT IS ORDERED as set forth below:

Date: May 20, 2013

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

FLYBOY AVIATION PROPERTIES, LLC,

Debtor.

FLYBOY AVIATION PROPERTIES, LLC,

Plaintiff,

v.

RICHARD FRANCK,

Defendant.

CASE NO. 13-55775-BEM

CHAPTER 11

ADVERSARY PROCEEDING NO.
13-05111-BEM

ORDER

This matter came before the Court on May 15, 2013, for consideration of Defendant, Richard Franck's ("Defendant") "Motion to Remand Case to Superior Court of

Forsyth County And Motion To Lift Stay, Or In The Alternative, Motion To Expedite Case And Motion To Require Plaintiff To Comply With Order Compelling Discovery” (the “Hearing” and the “Motion”). [Doc. No. 8]. The parties each filed briefs prior to the Hearing and counsel for each of Debtor and Defendant presented argument at the Hearing.

Plaintiff Flyboy Aviation Properties, LLC (“Debtor”) filed a chapter 11 case on March 15, 2013. Subsequently, Debtor removed, pursuant to 28 U.S.C. §1452(a), a civil action pending in the Superior Court of Forsyth County, Georgia (the “Superior Court Case”) to this Court as adversary proceeding number 13-05111 (the “Adversary”). [Doc. No. 1]. Debtor is the owner of a 14-acre private airport in Forsyth County, Georgia (the “Property”) upon which the Defendant claims an easement. On March 5, 2008, Debtor filed the Superior Court Case seeking an injunction prohibiting Defendant’s trespass onto the Property, including but not limited to take off and landing of any aircraft. [Doc. No. 1, Ex. 2]. Defendant answered and brought counterclaims alleging that Debtor’s property is subject to an easement which allows Defendant to use the Debtor’s airport. [Doc. No. 1, Ex. 6]. The record in the Superior Court, as gleaned from the exhibits to the complaint filed in the Adversary, indicates that the parties agreed to continue the hearing on the Debtor’s request for preliminary injunction, that the parties have had various discovery disputes since the Superior Court Case was filed and that Defendant sought to recuse the Superior Court Judge by motion filed December 21, 2012. [Doc. 1 No., Ex. A-4, A-13, A-40, A-41, A-42, A-46, A-50]. The record further shows that Debtor was ordered to produce certain documents on March 17, 2013, and that trial in the Superior Court was scheduled for March 18, 2013. [Doc. No. 1, Ex. A- 51, A-69].

Defendant seeks an order remanding this Adversary, because, according to Defendant, the filing of Debtor’s chapter 11 case and removal on the eve of trial amounts to

blatant forum shopping.¹ Debtor argues that the rental income received from the Property is insufficient to fund the monthly payment on the first mortgage on the Property, that the principals of the Debtor have funded the monthly shortfall for an extended period and that Debtor seeks to sell the Property pursuant to section 363 of the Bankruptcy Code (the “Code”) or possibly file a plan. Debtor has obtained an order establishing a bar date in the main bankruptcy case and has employed a broker to market the Property for sale. [Doc. No. 25, 27 (main case)]. Debtor’s counsel states that expressions of interest in the Property have been received and the Debtor hopes to file a 363 motion in as little as two (2) weeks. Further, Debtor’s counsel argues that the Property may well be sold for a different use which would cause the Adversary to be moot. Defendant disagrees and argues that the Property, if sold, will remain subject to Defendant’s easement and that a sale of the Property for a use other than as an airport is prohibited by Defendant’s easement.

Discretionary abstention is governed by 28 U.S.C. §1334(c)(1)² which provides that a bankruptcy court may abstain from hearing a proceeding arising in or related to cases under title 11 “in the interest of justice, in the interest of comity with State courts or respect for State law.” See 11 U.S.C. § 1334(c)(1). There are several factors that the courts consider to determine whether abstention is appropriate:

“1) the effect of abstention on the efficient administration of the bankruptcy estate; 2) the extent to which state law issues predominate over bankruptcy issues; 3) the difficulty or unsettled nature of the applicable law; 4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; 5)

¹ Defendant argues in his brief that the court should exercise its discretion and abstain pursuant to 28 U.S.C. §1334(c)(1). Defendant acknowledges that the Adversary is not subject to mandatory abstention because the issues raised in the Adversary are core matters. The Court agrees that determination of Defendant’s interest, if any, in the Property is a core matter.

² Defendant did not argue that the Court should remand the Adversary pursuant to 28 USC 1452(b), which provides that in a removed action the Court may remand on “any equitable ground”. The factors considered under section 1452(b) and those considered under 1334(c)(1) are similar. See *Lester v. TitleMax of South Carolina (In re Titlemax Holdings, LLC)*, 447 B.R. 896, 900 (Bankr. S.D. Ga 2010).

the basis of bankruptcy jurisdiction, if any, other than 28 U.S.C. §1334; 6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; 7) the substance rather than form of an asserted “core” proceeding; 8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court’s docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; (13) comity; and (14) the possibility of prejudice to the other parties in the action.”

See Lester v. TitleMax of South Carolina (In re Titlemax Holdings, LLC, 447 B.R. 896, 900 (Bankr. S.D. Ga 2010)(*citing cases*).

No one factor is controlling and courts have discretion to determine the relative weight afforded each factor. *See Welt v. EfloorTrade, LLC (In re Phoenix Diversified Investment Corp.)*, 439 B.R. 231, 246 (Bankr. S.D. Fla. 2010).

Several of the fourteen abstention factors militate toward abstention. Those factors favoring abstention are: (i) the issues in the Adversary are solely state law issues, (ii) but for the Debtor’s chapter 11 filing this Court would not have jurisdiction in the Adversary, (iii) given the timing of the filing of the bankruptcy case the possibility that the Debtor has engaged in forum shopping, (iv) Debtor’s jury trial demand in the Superior Court (the Debtor has consented to entry of a final order by this Court), (v) presence of non-debtor parties, and (vi) comity given the Georgia courts’ interest in matters related to real property located in Georgia. Conversely, several factors militate toward denying the Motion. Those factors are: (i) the law on easements is not unsettled, (ii) there are no other proceedings commenced in any other court, (iii) the substance of the issues raised is core; and (iv) the issues raised cannot be severed from core bankruptcy matters. In addition, and key to the Court’s determination that the Adversary should

remain in this Court, is the effect of abstention on the efficient administration of the bankruptcy estate and the degree of relatedness of the Adversary to the main case.

The issues raised in the Adversary, as illuminated at the Hearing, are integrally related to the bankruptcy case and its efficient administration. Whether Defendant has an easement for use of the Property clearly affects the value of the Property and further affects Debtor's options with respect to its reorganization. Debtor argues that it can sell the Property for a different use while Defendant argues that Debtor is prohibited from selling the Property for any use other than as an airport. Thus, if Debtor files a sale motion that contemplates the sale of the Property to a buyer who intends to use the Property for anything other than an airport, the issue of permitted use and the existence or nonexistence of an easement would necessarily be before this Court. This Court is the court that would determine whether a sale under section 363 of the Code is appropriate. *See* 28 U.S.C. §1334 ; 28 U.S.C. §§ 157(a), 157(b)(2)(M). This raises the specter of possible delay³, potential loss of sale opportunities and the possibility of inconsistent results regarding Defendant's asserted easement. Given that the issues in the Adversary are central to Debtor's ability to pursue a possible sale of the Property and thus, to the timing and type of reorganization that the Debtor may pursue, the Court concludes that the Motion should be denied.

Defendant identified certain documents addressed in the Superior Court's March 7, 2013 Order on Defendant's Motion to Compel (the "March 7 Order") that Defendant has not yet received. [Doc. No. 1, Ex. No. A-69]. Defendant's counsel also states that he wishes to depose one of Debtor's principals. Debtor argued that discovery has closed and should not be extended given the Superior Court denied the Defendant's motion to extend discovery in the

³ Counsel at the Hearing indicated that the Superior Court docket is busy and could not give this court any estimate when the Superior Court could try this matter. This Court's docket is busy as well and this factor does not affect the Court's analysis.

March 7 Order. *Id.* The Court is mindful of the need to resolve the issues raised in the Adversary expeditiously and, given the substantial time for discovery while the Superior Court Case was pending, any time for discovery in this proceeding will be limited.

Accordingly, it is now hereby

ORDERED that, except as provided herein with respect to discovery, the Motion is DENIED.

IT IS FURTHER ORDERED that the Plaintiff shall produce the documents identified in the March 7, 2013 Order on or before May 30, 2013.

IT IS FURTHER ORDERED that on or before May 30, 2013, Defendant shall describe, with reasonable particularity, the matters upon which Defendant seeks to examine Mr. Voyles and shall file the description in this Adversary. The Court will then determine if the discovery period will be extended for a limited period of time to allow Defendant to take an additional deposition of Mr. Voyles.

END OF ORDER

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